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**BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE,
MONTANA STATE AUDITOR
STATE OF MONTANA**

IN THE MATTER OF MONTANA FARM BUREAU FEDERATION, Respondent.	CASE NO. INS-2011-242 **RESPONSE TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Commissioner of Securities and Insurance, Montana State Auditor (CSI), by and through its counsel of record, responds to Respondent's Motion for Partial Summary Judgment (Motion) (incorporated by reference herein). In sum, Respondent argues that because it is not in the business of insurance, the consumer protection provisions of the Unfair Trade Practices Act (UTPA) do not apply. Additionally, Respondent appears to argue that the CSI has punished New West for its alleged misrepresentations and that it would be unfair to punish Respondent for New West's acts since Respondent relied on New West's representations. Respondent misstates both the law and the facts surrounding this action and the Motion should be rejected accordingly.

ARGUMENT

1. There are disputed material facts which preclude summary judgment.

Rule 56 of the Montana Rules of Civil Procedure governs summary judgment. A movant is entitled to summary judgment when the pleadings, affidavits, and discovery documents establish that there is ". . . no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mont. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the court is required to view the evidence in a light most favorable to the non-moving party. *Prindel v. Ravalli County*, 2006 MT 62, MT ¶ 19, 331 Mont. 338, 133 P.3d 165.

Respondent declares that there are "undisputed material facts." (Motion, p. 2). These facts are supported by an affidavit of Jake Cummins, president of Montana Farm Bureau Federation (MFBF). Aff. of Jake Cummins (Jan. 7, 2013). The CSI has not deposed Mr. Cummings, nor has it been contacted by Respondent's counsel to confirm that these facts are truly "undisputed." Particularly, the "undisputed material facts" include Mr. Cummins' assertion that Respondent "does not conduct insurance business." *Id.* at ¶ 3. Mr. Cummins also states that it is undisputed that MFBF did not ask its insureds to apply for the New West plan. *Id.* at ¶ 18.

The CSI alleges the Respondent acted as an unlicensed producer when, through its agents, it promoted the New West plan. Notice of Proposed Agency Action; attached Exhibit A. The CSI bases its allegation on its interpretation of the Montana Insurance Code and the facts identified in its Notice; it is unclear which law Mr. Cummins relies upon. His conclusory statement that MFBF "does not conduct insurance business" is offered under the thinly veiled guise of an "undisputed" fact.

Thus, the fact that Respondent does not transact insurance is, in fact, disputed. If Respondent is found to be an unlicensed insurance producer, as the CSI has alleged, then Respondent is in the business of insurance by the very cases the Respondent has cited since insurance producers are indeed insurance agents.[1] Moreover, the Montana Supreme Court has found that adjustors, agents, and agencies are prohibited from engaging in the unfair trade practices set forth in Mont. Code Ann. § 33-18-201 in their individual capacities. *Fillinger v. Northwestern Agency* (1997), 283 Mont. 71, 85-86, 938 P.2d, 1347, 1356-57 (citing *O'Fallon v. Farmers Ins. Exch.* (1993), 260 Mont. 233, 244, 859 P.2d 1008, 1015). In *Fillinger,* the Court specifically held that a sales agency with no claims-handling authority was subject to the UTPA.[2] The *Fillinger* Court quotes extensively from the UTPA in reaching its determination, stating:

> Northwestern contends that this is err, as this Court has not decided that § 33-18-201, MCA, is applicable to an insurance agency.
>
> The language of the Unfair Trade Practices Act aids in resolving this argument. Section 33-18-101, MCA, states that the purpose of the UTPA "is to regulate trade practices in the business of insurance." The Act further provides that "no person shall engage . . . in any trade practice which is defined . . . to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." Section 33-18-102, MCA. Furthermore, the Act does not exclude misrepresentations committed by an insurance agent in the sale of a policy. Section 33-18-201(1), MCA, provides specifically that "no person may . . . (1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue."
>
> The Fillingers correctly assert that the actions of Northwestern and Jenkins fall squarely within these prohibited practices. In *O'Fallon v. Farmers Ins. Exch.* (1993), 260 Mont. 233, 859 P.2d 1008, we considered the individual liability of the claims adjustor assigned to handle the claim and concluded that:
>
> Individuals, as well as insurers, are prohibited from engaging in the unfair trade practices set forth in § 33-18-201, MCA, and that when an individual breaches the obligations

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[1] Respondent cites *Kaseta v. Northwestern Agency of Great Falls* (1992) 252 Mont. 135, 827 P.2d 804 (noting that the UTPA applies to insurance agents). Motion, P. 4. While that case does not mention anything regarding insurance agents being subject to the UTPA, clearly they are engaged in the business of insurance per *Fillinger.*

[2] Respondent's analysis directly contradicts this by stating the business of insurance applies only to entities involved in the mass shifting of risk. Furthermore, Respondent notes that licensed insurance agents are involved in mass shifting of risk. *Id.* Insurance companies are certainly involved in that; insurance agents (i.e. producers) are not.

imposed by that statute, the claimant who is damaged by that breach has a common law cause of action against that individual.

Id.

Respondent's attempt to bifurcate the UTPA claim from the CSI's unlicensed producer claims includes an implicit suggestion regarding regulation – that the failure to register as a producer precludes the CSI from taking action against Respondent. This absurd conclusion begs an equally absurd result – that to circumvent the UTPA, it would be best to not register with the CSI. The CSI has alleged MFBF acted as an unlicensed producer.[3] If the CSI's allegation is confirmed, and Respondent is held to be an insurance producer, then it fits squarely within the *Fillinger* test – it is an agency involved in the business of insurance.

Mr. Cummins also states that it is undisputed that MFBF did not ask its members to apply for the New West product. Aff. of Cummins, ¶ 18. Exhibit B demonstrates that Mr. Kulbeck requested talking points so that when members called, Respondent could urge them to join the plan. Attached Exhibit B. Thus, this fact is disputed. Mr. Cummins states MFBF never made a statement that premium risk would be spread across its large membership. Aff. of Cummins, ¶ 14. However, the CSI alleges that indeed happened, both when Mr. Kulbeck developed the radio spots, as evidenced by his December 2, 2009, email to Therese Fairbanks, and when Mr. Kulbeck worked with New West on the membership pamphlet which it would later send out. Attached Exhibits C, G. Thus, this statement is also disputed.

What actually appears to be undisputed is that Respondent sent a mailing to its membership with incorrect information. Aff. of Cummins, ¶ 17; *See* attached Exhibits D, G. It is also undisputed that Respondent provides insurance information to its membership from time to time. Aff. of Cummins, ¶ 7. Furthermore, Respondent placed incorrect information on its

[3] For those unfamiliar with the insurance terms, a producer is an agent or agency.

website concerning the product at issue. *See* attached Exhibit E. Finally, Respondent developed radio spots wherein it extolled the virtues of the New West policy. *See* attached Exhibit C. These undisputed facts, unlike Mr. Cummins' vague assertions, certainly qualify as engaging in the business of insurance as detailed below.

2. Respondent engaged in the "business of insurance."

Even if the Hearing Examiner finds there is no disputed material fact, Respondent engaged in the business of insurance as contemplated by statute. Respondent sent out flyers, placed information about insurance on its website, and made radio promotions extolling an insurance product. These endorsements alone qualify as the "business of insurance" independent of the producer question, and are undisputed.

A. Respondent's reliance on *Ogden* is misplaced because the Respondent is not a self-insured entity.

Respondent incorrectly cites *Ogden* by stating that one must be an insurer for the UTPA to attach. Motion, P. 3 . However, *Ogden* dealt with a self-insured business, Montana Power, and the Montana Supreme Court noted that a self-insured entity should not be subject to all the technical Montana insurance regulations. *Ogden v. Montana Power Co.* (1987), 229 Mont 387, 392, 747 P.2d 201, 204. Furthermore, the Montana Legislature has unambiguously applied a limited number of UTPA sections to the self-insured entity rather than the entire UTPA chapter, thereby exempting Montana Power and self-insured entities from the UTPA. Mont. Code Ann. § 33-18-242.

It makes sense that a self-insured business would be exempted from the UTPA – it regulates itself, does not engage the public in the business of insurance, and has a limited number of insureds when compared to standard insurers. The Supreme Court's determination that it was

not regularly engaged in the business of insurance naturally follows. Interestingly, Respondent fails to note that it is not a self-insured entity engaging in the business of insurance. Respondent also fails to address that it acts as a middle man between regulated insurers and its membership, as admitted by Cummins in his affidavit (stating that Respondent negotiates rates for its membership with insurance companies). Aff. of Cummins, ¶¶ 8, 12. In sum, Respondent's reliance on cases which address self-insured entities is simply misplaced.

B. Respondent equivocates the meaning of insurance and the business of insurance.

Respondent incorrectly cites *K.W. Industries* to make its point that the term "insurance" is narrow. Motion, p. 3-4. Here, Respondent argued that the "Montana Supreme Court had defined the term very narrowly" and that "[t]he Supreme Court has held to this definition." Motion P. 3-4. Respondent cited this narrow definition allegedly held by the Court: "[...][i]nsurance is that business where a large number of risks are accepted, some of which involve losses, and the spreading of such risks which enables the insurer to accept each risk at a slight fraction of the possible liability upon it." *Id.* This is a gross misstatement of that case and the proposition for which it stands.

In *K.W. Industries,* a surety insurer was claiming sureties were not subject to the UTPA. The appellant, National Insurance Company (National), made the aforementioned quote on brief, which the Montana Supreme Court then cited while describing National's argument. *KW. Indus. v. Nat. Surety Corp.* (1988), 231 Mont. 461, 465, 754 P.2d 502, 504. Unquoted by Respondent, however, is that the Montana Supreme Court then *rejected* National's argument regarding the UTPA, and affirmed that for purposes of the UTPA, surety was included within the definition of insurance. *Id.* The Court did not delineate what qualified as the business of insurance beyond describing how it applied to an insurer because that was the only question before the Court. For

the Respondent to state that the Court has held that the definition of the business of insurance provided by the losing party, and applicable only to the word "insurance," and relative only to an insurer, is the singular definition that applies to the UTPA, as the Respondent does in its Motion, is to blatantly misinterpret Montana case law and the plain language of the statute. The extremes to which Respondent stretches logic becomes evident when Respondent attempts to state that an insurance agency is involved in the mass shifting of risk, something which is blatantly not true. Ironically, agencies are involved in risk transfer only inasmuch as they produce insurance business..

The Supreme Court has not interpreted the term "business of insurance" beyond stating what is found in statute, as it did in *Britton v. Farmers Ins. Group* and *Fillinger*. In *Britton*, the Court held that the stated purpose of Montana in adopting the trade practices law was "to regulate the business of insurance in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act." *Britton v. Farmers Ins. Group* (1986), 221 Mont. 67, 98-99, 721 P.2d 303, 323. The McCarron-Ferguson Act does not define the business of insurance. It does, however, note that the business of insurance, and every person engaged therein, is subject to regulation of the laws of the states. Pub. L. 79-15, § 2, 59 Stat. 33, S. 340, enacted March 9, 1945. This is precisely what the *Fillinger* and *O'Fallon* Courts found. In *O'Fallon*, the Court held that individuals, as well as insurers, are prohibited in engaging in unfair trade practices. *O'Fallon*, 260 Mont. at 244-245, 859 P.2d at 1015. In *Fillinger*, it held that not only were individuals subject to the act in general, but they were also subject to the very statute at issue here, Mont. Code Ann. § 33-18-202. *Fillinger*, 283 Mont. at 86, 938 P.2d at 1357.

C. The UTPA applies to all "persons" engaged in the business of insurance.

Respondent's dismissal of the UTPA understates both legislative intent and the CSI's mission to protect consumers. As noted previously, the UTPA is designed to prevent persons engaged in the business of insurance from engaging in practices which "constitute unfair methods of competition or unfair or deceptive acts or practices, and by prohibiting the trade practices so defined and determined." Mont. Code Ann. § 33-18-101. Clearly, the business of insurance includes a third party engaging membership of an organization to purchase a particular type of insurance. It certainly includes the negotiation with insurance companies for lower rates, as Respondent has done here. Aff. of Cummins, ¶ 11-12. Finally, it includes providing a forum by which potential insureds could go to Respondent's website and complete an insurance application. *See* attached Exhibit D.

The UTPA's definition of misrepresentation and false advertising of policies is likewise broad in its scope. That statute, codified at Mont. Code Ann. § 33-18-202(1), states that no person shall make, issue, circulate, or cause to be made, issued, or circulated, any estimate, illustration, circular, sales presentation, omission, comparison, or statement which misrepresents the benefits, advantages, conditions, or terms of an insurance policy. Any interpretation short of the plain language of the statute would not only ignore Supreme Court precedence, as noted in *Britton, O'Fallon,* and *Fillinger*, it would eviscerate the UTPA and the CSI's mission by excluding from regulation entities which do not write business directly.

The statute does not say an insurer. It does not say a producer. It says any person. The Insurance Code defines person as: "[...] an individual, insurer, company, association, organization, Lloyd's, society, reciprocal or interinsurance exchange, partnership, syndicate, business trust, corporation, or any other legal entity." Mont. Code Ann. § 33-1-102(3). Certainly, Respondent fits within this definition as a legal entity. The legislature has had ample

opportunity to clarify its definition of person as it has done with regard to self-insured businesses at Mont. Code Ann. § 33-18-242(8). It has not done so. Furthermore, Respondent has not cited anything which would make it exempt from the UTPA, either in statute or in common law, despite its valiant attempts to do so. Respondent engages in the business of insurance as contemplated by Montana statute and Respondent's attempts to incorporate a narrow reading of the term "insurance" in lieu of the plain language of the statute, which specifies the business of insurance, is ill-founded.

D. Respondent's use of logic is not based on fact or in law and should be rejected.

Finally, Respondent contends that the logic of its alleged rules would cause a manifest injustice. Motion, P. 4. It cites no law in that assumption and instead lays the blame at the feet of New West. However, the logic of the UTPA is clear – persons engaged in the business of insurance should make certain that the statements they make are true and accurate. New West was not fined by the CSI for having done so, despite Respondent's assertions otherwise.[4] However, even if it were fined for such behavior, that would not be prohibit the CSI from engaging Respondent in this matter. Respondent's members, receiving information from Respondent, were the persons subjected to the false statements. As Mr. Cummins stated, Respondent works with insurers to provide affordable, effective insurance products. Aff. of Cummins, ¶ 8. Respondent provides its membership with information about these insurance products. *Id.* at ¶¶ 7, 9. Respondent's membership relied on Respondent to provide it with accurate information in its mailings and on its website. Respondent failed in that duty. *See* attached Exhibit G.

[4] New West was fined for illegal dealing in premium for its role in the foregoing of commissions and an unrelated forms matter.

Ironically, even Respondent's attempt to trivialize its involvement in the insurance business by comparing it to the postal service fails. The postal service did not pay to have a mailing sent to its customers, as did Respondent. Aff. of Cummins, ¶ 10. The postal service did not negotiate insurance rates for its customers, as did Respondent. *Id.* at ¶ 12. The postal service did not receive a commission based on the amount of customers who actually signed up for the plan upon receiving that mailing, as did Respondent. *See* Notice; attached Exhibit F. Finally, the postal service did not place false information on its website which linked directly to benefit descriptions, rates, and enrollment forms, as did Respondent. *See* attached Exhibits B, C, E. These are interactions which fall within the business of insurance, despite Respondent's protestations and assertions otherwise.

Conclusion

Respondent relies on disputed material facts, and for that reason alone, its Motion should fail. Furthermore, Respondent's legal interpretation of Montana case law and the UTPA incorrectly excludes from regulation entities which do not write business directly. This argument must likewise be rejected. Respondent's Motion must be denied.

DATED this 6th day of February, 2013.

BRETT O'NEIL
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served on the 6th day of February, 2013, to the following:

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